IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 448 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HAMIR KHODA VIRAS & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR SR DIVETIYA for Appellant(s) : 1 - 2.
MR KP RAVAL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 08/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374(2) of the Code of Criminal Procedure has been preferred by the present appellants-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 20th March, 1998 passed by the learned Additional Sessions Judge, Surat in Sessions Case No.129 of 1996 whereby the present appellants-accused were convicted for life and fine of Rs.500/-, in default, to undergo further one month S.I. for the charge under Section 302 read with 114 of the IPC and original accused no.3 viz., Gopal Laxman Vagha was acquitted for the charge alleged against him. However, State has not preferred any acquittal appeal against the said accused.

2. The case of the prosecution in short is that on 01.09.1995 at about 23:25, P.S.O. Athwa Lines Police Station, Surat received one telephonic vardhi from Civil Hospital, Surat

from one Woman Head Constable of Umera Police Station viz., Parvatiben Keshavbhai attached to the Civil Hospital and on receiving the same, it has been noted down in the vardhi book and entry to that effect has also been made in the station diary. Thereafter, he directed the Police Sub-Inspector, Shri Tukaram Dagabhai Dhangar to go to Civil Hospital, Surat and inquire into the matter. In pursuance of that, P.S.I. Shri Tukaram Dagabhai Dhangar went there and inquired about the injured and recorded the complaint (Exh.40) given by the complainant narrating that on 01.09.1995 at about 9 p.m., when he was standing near Kedarchacha's Pan Galla, quarrel took place between Kamlesh Gambhir with Hamir Khoda and Trikam Punja and two other persons. He tried to intervene the same, but as a result of that, Hamir Khod and Trikam Punja and other two persons used filthy language and Trikam Punja gave knife blow on his left hand, chest, stomach and thigh and other parts of the body. On raising

screams, mother, father and other persons gathered there and, thereafter, the victim was taken to hospital in autorickshaw. Thereafter, he sent the same for registering the offence and on receiving the same, it has been registered as Athwalines Police Station C.R.No.298/1995. Initially, the complaint has been registered for the offence under Section 307, 504 and 114 of the IPC and under Section 135 of the Bombay Police Act. He received further telephonic message that the injured–Mahesh succumbed to the injuries and, therefore, Section 302 of the IPC was added.

3. Upon such complaint, investigation was commenced. Firstly, he wrote a yadi to Executive Magistrate for recording the dying declaration of the injured – Mahesh. In pursuance of that, the Executive Magistrate viz., Pravinlal came to Civil Hospital, Surat and after ascertaining the condition of the injured and his capacity for recording the dying declaration, the Executive Magistrate recorded the dying declaration. The Executive

Magistrate also recorded the statements of father and mother of the injured. Meanwhile, as injured – Mahesh succumbed to the injuries, Section 302 was added accordingly and further investigation has been started. First of all, he made arrangement to send the dead body for the purpose of postmortem and, therefore, he wrote yadi to that effect and on receiving the same, panel of doctor of the Civil Hospital, Surat performed the postmortem of the body of the deceased – Mahesh. Meanwhile, he also drew panchnama of scene of offence and collected the muddamal including the clothes wore by the deceased at the time of incident. He also made efforts to nab the accused. On arresting the accused, he prepared arrest panchnama and seized the clothes of the accused persons wore at the time of incident. Not only that, the original accused no.1 expressed willingness to show the muddamal articles i.e. Rampuri Chaku, which has been hidden on a particular place and, therefore, the I.O. called the panchas

and drew preliminary panchnama and, thereafter, at the instance of the appellant-accused no.1, all went to the place in a Police jeep along with the panchas, where the accused produced the muddamal knife and panchnama to that effect has been prepared and seized the muddamal. It was kept along with the clothes, wore at the time of incident. Even, other weapons, produced by the other accused, have also been seized after following proper procedure and necessary arrangement was made to send all the muddamal to FSL for the purpose of examination. On arrival of the report, it has been kept with the papers of the investigation along with the postmortem note and death certificate.

4. After completion of the investigation and on the basis of the material collected against the appellants, since the Investigating Officer found a prima-facie case against the appellants, he submitted a chargesheet before the Learned Judicial Magistrate, First Class,

Surat for the offence punishable under Sections 302, 504 and 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act. As the offence against the appellants-accused was exclusively triable by the Court of Sessions, the Learned Judicial Magistrate, First Class, Surat was pleased to commit the case to the Court of Sessions under Section 209 of the Cr.P.C. On arrival of the same, it has been numbered as Sessions Case No.129 of 1996 and transferred in the Court of Learned Additional Sessions Judge for trial. On receiving the same and production of the accused, Learned Additional Sessions Judge framed the charge against all the accused, wherein they pleaded not guilty and prayed for trial.

5. To prove the guilt against the appellants-accused, the prosecution examined Prosecution Witness No.1, Shri Pravinbhai Motilal Vankavala Exh.11 (the person, who recorded the dying declaration at Exh.14), Prosecution Witness No.2, Dr.Rakesh Narendranath Tandan

Exh.17 (the persons, who performed the postmortem of the deceased along with panel doctor Shri Subramaniam), Prosecution Witness No.3, Dahiben Kanjibhai Nagjibhai Exh.20 (mother of the deceased), Prosecution Witness No.4, Kanjibhai Nagjibhai Exh.26, Prosecution Witness No.5, Kamlesh Gambhirbhai Baraiya Exh.27 (this being an eyewitness supported the case of the prosecution), Prosecution Witness No.6, Shri Pandit Vedu Patil Exh.28 (Police Constable, Athwa Lines Police Station), Prosecution Witness No.7, Nizamuddin Sherali Saiyed Exh.29 (panch of seizure clothe panchnama), Prosecution Witness No.8, Mahammad Amani Mahammad Yakub Shaikh Exh.31 (panch of Section 27 panchnama of article Nos.10 and 11 i.e. knife and dragger respectively seized from the accused nos.1 and 2), Prosecution Witness No.9, Govindbhai Karshanbhai Viras Exh.33 (Relative of the accused no.1), Prosecution Witness No.10, Shri Mahammad Hanif Gulam Husen Exh.34 (panch of the scene of offence panchnama),

Prosecution Witness No.11, Madhukar Yadavrao Sirsat, Exh.36 (Police Constable, who recorded the telephonic vardhi), Prosecution Witness No.12, Shri Tukaram Dagabhai Dhangar, Exh.39 (Police Officer, who went to Civil Hospital, Surat for recording the complaint of the victim and also initiated further investigation of the matter), Prosecution Witness No.13, Naranbhai Paljibhai Baraiya Exh.44 (this witness prepared the map of offence on the basis of panchnama of the place of offence) and Prosecution Witness No.14, Ranvirsing Badansing Puvar (this witness was entrusted the investigation from Shri Dhangar and completed the investigation and submitted the chargesheet.

6. The prosecution has also placed reliance on the documentary evidence i.e. yadi of dying declaration Exh.12, office copy of the yadi Exh.13, dying declaration Exh.14, yadi for postmortem Exh.14, cause of death certificate Exh.19, inquest panchnama Exh.21, clothe seized from the body of the victim Exh.22,

copy of telephonic verdhi book register Exh.23, copy of Police Station Diary Entry No.50/1995 Exh.24, telephonic vardhi book registration entry Exh.25, search and seizure panchnama of accused viz., Hamir Khod and Trikam Puja Exh.30 and 32, panchnama of offence place Exh.35, complaint Exh.40, report for registering the offence Exh.41, yadi for amending Section 302 Exh.42, yadi by way of which, P.S.O. directed the P.S.I. to inquire into the matter Exh.43, FSL report, forwarding letter and report Exhs.48 to 51 respectively etc.

7. At the end of trial, the Learned Additional Sessions Judge, Surat recorded further statement of the appellant-accused under Section 313 of the Criminal Procedure Code and after giving opportunities to the learned advocates appearing for the respective parties convicted the appellants-accused as aforesaid giving rise to the present appeal.

8. Heard learned counsel for the appellants-accused, Mr.S.R. Divetiya and learned APP

Mr.K.P. Raval for the respondent-State at length.

9. It has been mainly argued by the learned counsel for the appellants-accused that the case of the prosecution is based on circumstantial evidence as well as on the dying declaration. It is further argued that there are four dying declarations, but as per the evidence on record, same are not trustworthy and are also not free from the doubt and, therefore, according to him, as per the settled law, above referred dying declarations are required to be discarded and in absence of that, there are no other evidence worth the name to connect the accused with the crime in question. It is also argued that the injuries alleged to have been received by the deceased were such, even, he was not in a position to give any dying declaration. He has also taken us to the various judgments regarding the dying declaration i.e. under Section 32 of the Indian Evidence Act, which are as under :-

1998(2) GLH 155

AIR 2002 SC 526

AIR 1999 SC 3455

2002 SCC (Cri) 1575

2002 SCC (Cri) 211

Out of aforesaid judgments, one judgment is of this High Court and it is on the point of oral evidence.

10. The learned APP, Mr.Raval took us to the oral as well as documentary evidence and also reasoned judgment delivered by the Court below and argued that the case of the prosecution based on the point of four dying declarations and out of four dying declaration, two are oral dying declarations, which have been given by the deceased on the spot, which alleged to have taken near the house of the deceased because after hearing the shout for help, the mother and father went there and before him, the deceased narrated the incident and also told the name of the assailant accused and the weapon used by them. According to him, the mother and

father took the deceased in the hospital, wherein the Executive Magistrate recorded the dying declaration and complaint was also registered by the P.I. Shri Dhangar. He also took us to the other relevant evidence viz., FSL Report and 27 panchnama. He argued on the point that the blood stain was found on the clothe of the accused, body of the deceased and weapon. It was the blood of human and group A. He also took us to the postmortem note and evidence of doctor, who has performed the postmortem and argued that the prosecution was able to prove the case against the accused beyond reasonable doubt and, therefore, the judgment does not require any interference.

11. We have gone through the facts of the above referred judgment, which is on the basis of special facts, wherein Division Bench of this Court has come to the conclusion that the presence of the concerned person, before whom, dying declaration was recorded was also gave in the Court and in that circumstances,

the dying declaration of the above referred has not been accepted by the Court. But here in this case, keeping in mind the law laid down by the Apex Court on the point of dying declaration, we will decide the matter on the basis of ratio laid down by the Apex Court and the evidence on record of the present case.

12. We have gone through the documentary evidence shown to us by the learned counsel for the respective parties along with the reasoned judgment and the judgment cited upon which, reliance has been placed by the learned counsel for the appellants. Keeping in mind above aspect of the matter including the law laid down by the Apex Court on the point of dying declaration, we have evaluated the evidence on record and proceeded further with the matter. Here, in this case, the evidence of the Prosecution Witness No.3, Dahiben Kanjibhai Exh.20 and Prosecution Witness No.4, Kanjibhai Nagjibhai Exh.26 being mother and father of the deceased, at about 8:30

p.m., they were at home and after hearing the shout, both went to the scene of offence, which is near the house along with other person immediately and saw that the deceased was lying in the pool of blood. Upon making inquiry, the deceased narrated the incident, name of the assailants and also weapons used by them and blow given to the deceased on the vital part of the body. They further deposed that both the witnesses have taken the victim to the Civil Hospital, Surat for treatment. Even during that period, when they were travelling in auto rickshaw, again the deceased narrated the same and their presence at the scene of offence is natural one at night hours and their presence in the hospital is also established by way of evidence on record and, therefore, it can be safely said that they were present and took the victim to hospital. Not only that these witnesses have been thoroughly cross-examined by the learned counsel for the appellants, but nothing contrary has come on record,

which shake their testimony and merely they are father and mother of the deceased, they are the nearest relatives only on that ground as per the settled law, their evidence cannot be discarded. It is also true that while evaluating the evidence of the nearest relatives of the deceased, Court should be much more cautious and before placing reliance upon the same, it should be evaluated minutely and if they stood trustworthy then, Court can certainly rely on the judgment upon which reliance has been placed on the point of dying declaration. We have gone through the same, wherein Court has not believed the oral evidence of the concerned witnesses mainly on the ground that Court has come to the conclusion that even he might not have been present at the time of alleged oral dying declaration, Court has not placed any reliance upon the evidence. Here, in this case, as we have discussed earlier, his presence is natural one and, therefore, we have reason to believe their evidence in

toto. Over and above, they got support from the other evidence i.e. other dying declaration, FIR (Exh.40) recorded by the Prosecution Witness No.7 P.S.I. Shri Dhangar, which has been proved by him by way of his oral evidence Exh.39. Not only that, the victim, who has given the FIR, succumbed to the injuries and, therefore, it can be said to be a dying declaration, wherein also, he narrated whole incident along with the name and the weapon used by the appellants and injuries received by him. Even the prosecution has also got support by way of another dying declaration recorded by the Executive Magistrate as she received the Police yadi for recording the same. She categorically deposed before the Court in toto narrating the fact that before recording the dying declaration of the victim, she took sufficient care, which is required to be taken before recording the dying declaration, which is on record and, therefore, it is not required to be discussed or reproduced here

at this stage. However, by way of her evidence, prosecution was able to prove the dying declaration. We have also gone through the dying declaration, which also supports the say of the prosecution in toto. We have gone through the judgments cited by the learned counsel for the appellants upon which reliance has been placed by him and keeping in mind the same, we have evaluated the dying declaration and we are fully satisfied with the dying declaration recorded by the Executive Magistrate, complaint Exh.40 recorded by the P.S.I. Shri Dhangar and two oral dying declarations made by the deceased before his mother and father, wherein as we have stated earlier, weapon, name of the assailants and role played by the assailants have been categorically established and prosecution was able to prove. Not only that the prosecution got supports from other independent evidence viz., 27 panchnama of the seizure of the weapon at the instance of accused along with the clothes seized from

the body of the accused and also from the deceased and panchnama to that effect has categorically established that there are blood stains on the clothes of the deceased. Not only that same has been sent to FSL and copy of the report is on record, which also totally support the say of the prosecution, wherein the human blood group has been found from the above referred muddamal including the dragger, Rampuri knife etc., and clothes of the deceased as well as the accused and has also been found that there was human blood of the group 'A'. Not only that even doctor, who performed the postmortem also categorically deposed and proved the injuries received on various vital part of the body of the deceased and after seeing the muddamal knife etc., the doctor categorically deposed that the injuries found on the body of the deceased was antimortem and could be possible by way of muddamal article nos.10 and 11. It is also required to be noted that the learned counsel for the appellants has mainly

concentrated his arguments on four dying declarations. According to him, they are not trustworthy, which we have discussed above. According to us, they are trustworthy and prosecution was able to prove the same beyond reasonable doubt and prosecution support from other aspects of the matter.

13. In these circumstances, it is a fit case, wherein appeal is required to be rejected.

14. The appeal is rejected.

(R.P.DHOLAKIA, J.) ***(H.B.ANTANI, J.)***

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